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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 1446

LAWRENCE GEORGE HENRY and DION TYRONE DIAMOND,
Petitioners

v.

COMMONWEALTH OF VIRGINIA, *Respondent*

On Petition for a Writ of Certiorari to the Supreme Court of Appeals of Virginia

BRIEF FOR RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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Court House
Arlington, Virginia

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 346

LAWRENCE GEORGE HENRY and DION TYRONE DIAMOND,
Petitioners

v.

COMMONWEALTH OF VIRGINIA, *Respondent*.

On Petition for a Writ of Certiorari to the Supreme Court of Appeals of Virginia

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BRIEF FOR RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

PRELIMINARY STATEMENT

By letter of the Honorable John F. Davis, Clerk of the Supreme Court of the United States, dated May 22, 1962, directed to the Honorable Robert Y. Button, Attorney, General of Virginia, a request was made to file a response to the petition for writ of certiorari in the instant case.* In accordance with the request, and in accordance with the practice in the State of Virginia and at the request of the Attorney General of Virginia, the within brief of the respondent in opposition to the

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* *Post*, Appendix A.

petition for writ of certiorari is filed by the Commonwealth's Attorney for Arlington County, Virginia, the jurisdiction in which the conviction of the petitioners was had.

PRIOR PROCEEDINGS

By judgment rendered by the Circuit Court of Arlington County, Virginia on November 3, 1960 in a prosecution by the Commonwealth of Virginia against the petitioners for a misdemeanor, the petitioners were convicted and their punishment was fixed at a fine of $25.00. A petition for a writ of error and supersedeas to the judgment of the Circuit Court of Arlington County was denied by the Supreme Court of Appeals of Virginia on April 25, 1961 and the cause is currently before this Court upon petition for writ of certiorari to the Supreme Court of Appeals of Virginia filed in the Supreme Court of the United States by the petitioners on August 23, 1961.

STATEMENT OF FACTS

On the 10th day of June, 1960, the petitioners went into Howard Johnson's restaurant located at 4700 Lee Highway, Arlington, Virginia, and after purchasing some popcorn, chewing gum and candy, one of the petitioners sat down at the lunch counter. The petitioners were asked by Mr. Gilewicz, the manager and person in charge of the said Howard Johnson's restaurant, to leave the premises and they refused. Mr. Gilewicz asked them to leave several times. Upon the refusal of the petitioners to leave the premises, Mr. Gilewicz asked a police officer who was sitting at the other end of the counter to take the petitioners out of the premises. The petitioners were arrested and charged under the Statutes of Virginia.

While it is true that the manager testified that he had no right to serve the colored people in the restaurant, the reason given by the manager for refusing to serve the petitioners was not because he believed that there was a law prohibiting the restaurant from serving colored people, but that the reason was that he did not like the petitioners because he considered them as trouble makers. (Tr. pp. 15, 16.)**

"Q. (by Mr. Tucker) Did you ever tell the police officer why you wanted these people removed?

A. (by Mr. Gilewicz) Oh, sure.

Q. What did you tell him?

A. I tell him I want them, because I consider them as troublemakers. They were trying the case of eating in my place, in the restaurant, or in my place, which I didn't like.

Q. Now, what do you mean, 'trying to eat in your place'? A. Well, you know better than I do why.

Q. I am asking you. A. You know that there is a law prohibiting to cater to colored people in the restaurant.

Q. I didn't quite understand what you said, sir.

A. Well, nobody, according to my information, we have no right to serve the colored people in our restaurant.

Q. Now, this was the reason why you did not want to serve these individuals?

A. No. The reason was, I did not like these two boys, because I considered them as troublemakers. I have nothing against colored people, but I don't like troublemakers.

Q. Had they been white people would you have served them?

A. I told you, I told the two newspapermen also to leave, because they started to make confusion and troubles."

** All references (Tr.) are to pages in the typewritten transcript.

THE STATUTE

Under attack in the instant case is Section 18.1-173 of the Code of Virginia (1950) as amended, which provides:

> "If any person shall without authority of law go upon or remain upon the lands, buildings or premises of another, or any part, portion or area thereof, after having been forbidden to do so, either orally or in writing, by the owner, lessee, custodian or other person lawfully in charge thereof, or after having been forbidden to do so by a sign or signs posted on such lands, buildings, premises or part, portion or area thereof at a place or places where it or they may be reasonably seen, he shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not more than one thousand dollars or by confinement in jail not exceeding twelve months, or by both such fine and imprisonment.
>
> "This section shall not be construed to affect in any way the provisions of §§ 29-165 to 29-170."

QUESTION PRESENTED

Does Section 18.1-173 of the Virginia Code, as applied to petitioners in the case at bar, contravene the Fourteenth Amendment to the Constitution of the United States?

ARGUMENT

Section 18.1-173 of the Virginia Code, as applied to petitioners in the case at bar, does not contravene the Fourteenth Amendment to the Constitution of the United States.

The premises in question in this case was a restaurant, not an inn. The proprietor of a restaurant, in the absence of statute, may accept some customers and re-

ject others on purely personal reasons. *Alpaugh* v. *Wolverton*, 184 Va. 943, 36 S.E. 2d 906.

The right of an operator of a private enterprise to select the clientele he will serve and to make such selection based on color if he so desires has been repeatedly recognized by the appellate courts of this nation. *State* v. *Clyburn*, 101 S.E. 2d 295, at page 299, and cases cited therein. Also, *Slack* v. *Atlantic White Tower Systems, Inc.*, 181 F. Supp. 124, at page 128.

A privately operated restaurant as an instrument of local commerce is at liberty to deal with such persons as it might select and the commerce clause of the Thirteenth and Fourteenth Amendments of the Federal Constitution do not operate to prevent proprietors from excluding negroes. *Williams* v. *Howard Johnson's Restaurant*, 268 F. 2d 845.

Accordingly, the defendants had no right, constitutional or otherwise, to be served in the restaurant in this case.

The action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the states. That amendment erects no shield against merely private conduct. *Shelley* v. *Kramer*, 68 S. Ct. 836, at page 842.

The defendants had no right to be served and, therefore, no right which could be impaired by a refusal of service. The continued presence of the defendants upon the premises after having been requested to leave amounted to a trespass for which the owner could call upon the law for assistance. *State* v. *Clybarn*, *supra*.

In *Griffin* v. *Collins*, 187 F. Supp. 149, at page 153, the Court says:

> "Plaintiffs have cited no authority holding that in the ordinary case, where the proprietor of a store, restaurant, or amusement park, himself or through his own employees, notifies the negro of the policy and orders him to leave the premises, the calling in of a peace officer to enforce the proprietor's admitted right would amount to deprivation by the state of any rights, privileges or immunities secured to the negro by the Constitution or laws. Granted the right of the proprietor to choose his customers and to eject trespassers, it can hardly be the law, as plaintiffs contend, that the proprietor may use such force as he and his employees possess but may not call on a peace officer to enforce his rights."

In *Slack* v. *Atlantic White Tower Systems, Inc.*, *supra*, at page 129, the Court said:

> "No doubt defendant might have had plaintiff arrested if she had made a disturbance or remained at a table too long after she had been told that she would only be sold food to carry out to her car. But that implied threat is present whenever the proprietor of a business refuses to deal with a customer for any reason, racial or other, and does not make an action state action or make his business a state agency."

The statute under which the prosecutions were had in this case is a non-discriminatory statute; it applies alike to all persons regardless of race, color or creed who violate it and the enforcement of such a statute could not be deemed to be "State action" within the meaning of the Fourteenth Amendment to the Federal Constitution.

CONCLUSION

For the foregoing, the respondent, Commonwealth of Virginia, respectfully submits that the judgments complained of are plainly right and that the petition for a writ of certiorari in this case should be denied.

Respectfully submitted,

WILLIAM J. HASSAN
Commonwealth's Attorney for Arlington County, Virginia

PETER J. KOSTIK
Asst. Commonwealth's Attorney for Arlington County, Virginia

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Arlington, Virginia

APPENDIX A

OFFICE OF THE CLERK
SUPREME COURT OF THE UNITED STATES
WASHINGTON 25, D. C.

May 22, 1962

The Honorable Robert Y. Button
Attorney General of Virginia
Richmond, Virginia

Re: Henry, Et Al. v. Virginia
No. 346, October Term, 1961

Dear Sir:

On August 23, 1961, a petition for writ of certiorari was filed in this Court in the above-entitled case.

I have been directed by the Court to request that a response be filed to the petition, and 40 printed copies of your response, together with proof of service thereof, should reach this office on or before June 5, 1962.

Very truly yours,

JOHN F. DAVIS, *Clerk*

By E. P. CULLINAN /S/
E. P. CULLINAN,
Chief Deputy

EPC:jmh

cc: William J. Hassan, Esquire
Commonwealth's Attorney
Arlington County Courthouse
Arlington, Virginia